SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6509

FRANK MIDDLETON,

Petitioner,

-versus-

STATE OF SOUTH CAROLINA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner herein, pursuant to his Affidavit, would move before this Court to be allowed to proceed in forma pauperis, pursuant to Supreme Court Rule 53(1) and 29 U.S.C. Section 1915.

GIBBS, GAILLARD, ROWELL & TANENBAUM

BY _____
COMING B. GIBBS, JR.

BY _____
MARK C. TANENBAUM

BY _____
A. HOYT ROWELL, III
Attorneys for Petitioner
122 King Street, P. O. Box 659
Charleston, South Carolina 29402

March 31st, 1976.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6509

FRANK MIDDLETON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

GIBBS, GAILLARD, ROWELL & TANENBAUM
122 King Street
Charleston, South Carolina

Attorneys for Petitioner

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SUPREME COURT, U.S.

75-6509

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF RICHLAND)

PERSONALLY appeared before me, Frank Middleton, who, being duly sworn, deposes and says:

That he is twenty-eight years of age and presently incarcerated in the Central Correctional Institute, a prison facility maintained by the State of South Carolina;

That he owns no real or personal property worth more than Five Hundred ($500.00) Dollars;

That his only source of income is from whatever work he can obtain within the prison system of the State of South Carolina, which he must use to purchase the necessities of life;

That he is unable to pay the costs for the prosecution of this Petition for Writ of Certiorari or the other fees and costs involved herein, and unable to give security therefor;

Further, affiant believes that he has been deprived of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and is entitled to redress therefor.

X Frank Middleton
Frank Middleton

SWORN to before me this 23 day of March, 1976.

Edsan B Wiggins (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires July 31, 1980

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CITATIONS

Cases:

Other References

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO._____

FRANK MIDDLETON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the South Carolina Supreme Court rendered in this case.

OPINIONS BELOW

The sentences imposed by the Court of General Sessions of Charleston County for the Ninth Judicial Circuit of the State of South Carolina are unreported. The opinion of the South Carolina Supreme Court is reported at _____ South Carolina _____, _____ Southeastern 2d _____ (1976) and is printed in the appendix, infra, pp. 10.

JURISDICTION

The decision of the South Carolina Supreme Court in this case was dated and entered on February 26, 1976. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(3).

QUESTION PRESENTED FOR REVIEW

Was it proper for the State Trial Court to allow the State to introduce in its case in chief, as evidence of guilt, the refusal of the Petitioner to consent to a search of his person, when he was not under arrest, had been advised of his Constitutional rights under the *Miranda* decision, and had been advised by the police officers proposing to conduct said search that he did not have to submit to the search?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States, Section 1, thereof:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Jurisdiction was had in this case in the Court of General Sessions of Charleston County for the Ninth Judicial Circuit of the State of South Carolina, upon two indictments charging rape and armed robbery, violations of Section 16-71 of the Code of Laws of South Carolina for 1962, as amended, and Section 16-333 of the Code of Laws of South Carolina for 1962, as amended.

The Petitioner was tried and convicted by a jury upon the two indictments which were consolidated for trial. The sentences were twenty-five years for armed robbery and forty years for rape, concurrently, the maximum on each indictment.

On July 27th, 1974, during the evening hours, an armed robbery occurred at a drive-in theater in the suburbs of Charleston, South Carolina, and a woman hostage was taken and subsequently raped by the person committing the armed robbery. Shortly after the incident took place, police officers converged on the home of the Petitioner herein and requested that he accompany them to the police station. The Petitioner complied.

Upon arriving at the Police Station, the Petitioner was given his *Miranda* warnings by a police officer and subjected to questioning concerning his whereabouts that

evening. At that point he was asked to submit to a combing of his pubic area, the admitted purpose of this combing to be a search for pubic hairs of the victim. After consenting to this search, the Petitioner, a black man, accompanied a white detective towards the men's room where the combing was to take place. While in route he was approached by the detective who had earlier given him his *Miranda* warnings, and was told by both police officers that he was not being charged with a crime and that he did not have to submit to the combing if he did not wish to do so. The Petitioner at that point asserted his right to refuse to consent to the search and went home.

The following day, the police officers in charge of the investigation of the case went before a Magistrate to request a Search Warrant to search the home of the Petitioner for fruits of the crime and evidence but the Magistrate refused to issue the Search Warrant on the basis of lack of probable cause. Later that day, the Petitioner was arrested and incarcerated, and was held by the police in custody until the date of the trial.

During the State's case in chief, the State, over the objections of the Petitioner on the basis of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, introduced into evidence the Petitioner's refusal to submit to the consent search of his pubic area.

After conviction in the Court of General Sessions, an appeal was made to the Supreme Court for the State of South Carolina which held that the introduction of this evidence was not invalid and affirmed the General Sessions Court.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of South Carolina is not in accord with the applicable decisions of this Court.

The decision of the Supreme Court of South Carolina below is in conflict with a series of decisions of this Court holding that the introduction into evidence by the State, in its case in chief, as evidence of guilt of an accused, of that accused person's invocation of his Fifth Amendment rights not to incriminate himself, is impermissible. *Miranda v. State of Arizona*, 384 U.S. 436; *Schmerber v. State of California*, 384 U.S. 757; *Malloy v. Hogan*, 378 U.S. 1.

In *Malloy, supra*, this Court held that the Fifth Amendment's exception from compulsory self-incrimination is protected by the Fourteenth Amendment against abridgement by the States. The precise issue here, the constitutional permissibility of the State's use, to prove guilt, of invocation of the Fifth Amendment privilege, was addressed but not decided by this Court in the case of *Schmerber, supra*. In *Schmerber*, this Court held that the withdrawal of a blood sample from the body of the defendant, and its introduction into evidence against the defendant, who was accused of a criminal offense of driving an automobile while under the influence of intoxicating liquor, did not violate the accused person's privilege against self-incrimination in that the Fifth Amendment applies only to evidence which may be termed "testimonial" or "communicative." However, the Court in *Schmerber*, did indicate that the use of an accused's refusal to submit to a bodily search as evidence of his guilt, as opposed to the introduction into evidence of the results of physical tests, would be governed by the Fifth Amendment, since such a refusal is the kind of evidence which may be classified as "testimonial" or "communicative". After concluding that the results of the blood tests in *Schmerber* did not constitute communicative, testimonial evidence because Schmerber's testimonial capacities were in no way implicated, this Court noted:

> "This conclusion would not necessarily govern had the state tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test - products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer a confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. ...
>
> "[The] petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introcution of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. State of California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda v. Arizona*, 384 U.S. at p. 468, n. 37, 86 S.Ct. 1624. Since trial here was conducted after our decision in *Malloy v. Hogan, supra*, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements. ..." *Schmerber v. State of California*, 384 U.S. at 765, n.9.

It is clear that in this case, unlike the factual circumstances in *Schmerber, supra*, the Petitioner's testimonial capacities were implicated. What is objected to as being constitutionally impermissible is not the introduction into evidence of the results of a physical test or search, since no search was conducted in this case, but rather the use by the State, to prove guilt, of the Petitioner's testimonial, communicative act of refusal to consent to the search, where consent was a necessity. In such a circumstance, the Court's decision in *Schmerber, supra*, clearly indicates that *Miranda, supra*, would be controlling.

In that portion of the *Miranda* decision cited in *Schmerber, supra*, this Court, after finding that the accused must be informed in clear and unequivocal terms that he has a right to remain silent in order to dispel not only the impression that the interrogation would continue indefinitely until a confession is obtained, but also the notion that silence in the face of accusation would be damaging to the accused, noted:

> "...In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at the trial the fact that he stood mute or claimed his privilege in the face of such accusation. ..." *Miranda v. State of Arizona*, 384 U.S. 468, n. 37, 86 S.Ct. at 1625 (citations omitted).

The Supreme Court of South Carolina, in its decision below, bottomed its finding upon two premises. First, there was no authority which requires the exclusion of testimony of Petitioner's refusal to submit to a test based upon the Fifth Amendment, and thus the South Carolina cases of *State v. Smith*,

230 S.C. 164, 94 S.E.2d 886 (1956), and *State v. Miller*, 257 S.C. 213, 185 S.E.2d 359 (1971), which held that the introduction into evidence of the refusal to submit to a breathalyzer test did not violate the defendant's privilege against self-incrimination, would be controlling. Secondly, the Court found that this Court's decision in *United States v. Hale*, ____ U.S. ____, 95 S.Ct. 2133 (1975), in which this Court held it was reversible error to allow the prosecution to introduce into evidence a defendant's silence prior to trial, was decided on evidentiary, non-constitutional grounds, inapplicable to state courts, and thus would not be controlling in Petitioner's case. As to the first of these propositions, the Petitioner would submit that the South Carolina Supreme Court's holding in this case, and its reliance therein on the aforenoted *Smith* and *Miller* decisions, is clearly at variance with this Court's holdings in the above quoted portions of *Miranda, supra*, and *Schmerber, supra*. Additionally, as to the latter proposition, while the majority opinion in *Hale, supra*, was based upon non-constitutional grounds, the Court explicitly recognized that the evidentiary problem in *Hale, supra*, contained "grave constitutional overtones." *Hale, supra*, ____ U.S. ____, 95 S.Ct. 2133 at 2138, n. 7. This Court in *Hale, supra*, did not reach the constitutional issue, since *Hale, supra*, being a case of Federal origin, was decided on the basis of this Court's supervisory authority over lower Federal Courts.

In summation, the precise issue involved in the instant Petition is whether the Fifth Amendment prevents the State in a criminal proceeding from introducing into evidence, in the State's case in chief, as proof of guilt, the refusal of the Petitioner to submit to a search. The

Petitioner submits that *Malloy, supra*, and its progeny, *Schmerber, supra*, and *Miranda, supra*, forbid the introduction of such evidence based upon the Fifth Amendment. Should the Court deny this Petition, then, on account of this Court's holding in *Hale, supra*, an incongruous situation would arise wherein persons in State Court criminal proceedings would be accorded lesser rights under the Fifth Amendment than persons in Federal criminal proceedings; a result completely at odds with the decisions of this Court, beginning with *Malloy, supra*, which have applied the protection of the Fifth Amendment as against the states with full force and effect.

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GIBBS, GAILLARD, ROWELL & TANENBAUM

BY _____
COMING B. GIBBS, JR.

BY _____
MARK C. TANENBAUM

BY _____
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